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No. 358.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

The military charge was violation of the sixty-second article of war, which subjects to trial by court-martial—

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline.

The specifications were the felonious killing of the two Filipinos. The approval of the findings by the commanding general states that Grafton was "found not guilty of manslaughter in violation of the 62nd article of war."

The civil charge was assassination—that is, murder in the first degree, for the killing of Villanueva.

The conviction in the Court of First Instance was for homicide under article 404 of the Code, without the extenuating circumstances set forth in article 8, but with the suggestion that the act was committed in a state of great mental excitement (sec. 7, art. 9). The sentence was imprisonment for twelve years and one day. The conviction was affirmed, the dissenting judges finding the homicide justifiable within paragraph 4 of article 8.

General Carfer testifies (p. 10) that he told the military officers not to order a court-martial until he had offered to submit the case to the Court of First Instance, which he apparantly did. But Mr. Ross, the prosecuting officer, testifies (p. 11) that on the day after the shooting he filed a complaint charging assassination, before a justice of the peace at Iloilo (see Philippine Act of August 10, 1901, 1 Pub. Laws, p. 527); that two orders of arrest were issued (which were evidently ineffective), and that then the information in the Court of First Instance was filed. Whatever this preliminary situation may have been, which is not clear, the military authorities did not suspend the court-martial proceedings in accordance with the usual practice, but went on and tried and acquitted the defendant. Villanueva and Castro were killed July 24, 1904; Grafton was arraigned on the military charge August 16, 1904, and was acquitted the same day. That finding was approved by the reviewing authority August 25, 1904. The civil complaint was filed in the Court of First Instance November 28, 1904.

I.

The Acquittal by Court-Martial was no Bar to the Civil Prosecution.

The precise point has never been adjudged by this court. (*Ex parte Mason*, 105 U. S., 696, 699.)

The military and civil jurisdictions are not mutually exclusive. It is not the case of competing civil judicatures seeking to punish for the same offense. An officer or soldier is bound to be a good citizen, and therefore he is liable to the same punishment as any other citizen for a given act. He owes peculiar obligations to the particular corporation of which he is a member, and if he commits a breach of these obligations, whether his act is punishable by the civil magistrate or not, he is punishable by military law. The military tribunal takes cognizance of the offense against the military organization and discipline; the civil tribunal of the crime against the whole community. There are two offenses; that is, different criminal qualifications of the same act. "The Articles of War do not punish forgery or libel as such, but they may punish the same act as a breach of military law or discipline." (6 Op. A. G., 413, 419).

Military law is an exceptional code, applying to a limited class of persons in given relations and not derogating from the general law of the land. The established doctrine is that an officer or soldier of the Army who commits an act anywhere within the territorial jurisdiction of the United States which is criminal both by the military and the general law,

is subject to trial by the latter in preference to the former. An act punishable by the laws of the land is to be punished according to those laws; that is, by the competent ordinary tribunals of the State or Territory in which the offense was committed.

Our Articles of War are based on the British mutiny acts, which have always provided in terms or in substance that they shall not be construed to exempt any officer or soldier whatsoever from being proceeded against by due course of law. (4 Geo. IV, c. 81, sec. 17; 3 and 4 Will. IV, c. 5, sec. 45; 3 and 4 Vict., c. 37, sec. 5.)

> Soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country and the fulfillment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country for all offenses against those laws and breach of those duties. It follows, therefore, that no crime for which the common or statute laws of the country have provided a punishment is cognizable before a court-martial. Nor can the military power interfere to prevent the punishment of any soldier guilty of such offenses, or supersede by any judicial procedure in a court-martial the ordinary effects of the laws of the cou try, unless in those extraordinary cases in which the legislature may find it necessary to proclaim martial law. (Tytler, Essay on Military Law, pp. 153, 154.)

See also Winthrop's Mil. Law, 2d ed., pp. 124, 396, 1076.

Except in time of war (art. 58) an officer or soldier accused of a capital crime or of any offense against the person or property of any citizen punishable by the laws of the land is to be surrendered to the civil magistrate upon application duly made by or on behalf of the party injured (art. 59). The test is the *charge*, which here was murder, and not the grade fixed by final conviction in the civil court, or the name which the military authorities must necessarily give the offense if they assume jurisdiction.

> For any act of homicide, however justifiable it may be, and although done strictly in the line of duty within the United States, and in time of peace, an officer or soldier of the Army is subject to trial by the civil authority. The Articles of War explicitly require that any officer or soldier *accused* of a capital crime or of having used violence against the person of any citizen of the United States such as is punishable by the known laws of the land, shall, on due application, be delivered over to the civil magistrate for trial. * * * If indicted, therefore, and demanded for trial, a soldier in the case supposed must be given up for trial, whether in California or in Oregon [then a Territory]. (7 Op., 561.)

Practically, as to all acts of ordinary violence committed within the interior of the Army the civil authority leaves to the military complete and exclusive jurisdiction and does not interfere to embarrass and obstruct. But a felony is distinguishable whether committed within or without the Army.

In the case of murder an application can not be made on behalf of the party injured, and it is the right of the State, on behalf of the society injured in his person, to move the courts to apply the laws of the land to the criminal.

The foregoing statement of principles is drawn largely from Mr. Cushing's discussion of the "Civil Responsibility of the Army." (*Steiner's case*, 6 Op., 413; see also *Howe's case*, id., 506.)

Steiner, an assistant surgeon of the Army, killed Major Arnold, commandant of Fort Graham, in Texas, at the post in 1853. Steiner was indicted in the State court, and was enlarged on bail pending trial. Meanwhile a court-martial was ordered to assemble on the charges of mutiny and breach of arrest. Mr. Cushing held that it was the duty of the general commanding to aid the political authority of the State in bringing the accused to trial on the pending indictment; that so long as the accused is not in the actual custody of the civil authorities, he is amenable to the military authorities for the military offenses; that it was expedient for the military authorities to suspend the trial of the military relations of the accused until the civil relations of that act shall have been tried by the civil magistrate; and that—

> The trial of Steiner by the civil authorities, whether it result in his acquittal or his conviction, can not be pleaded in bar on his arraignment before a court-martial. The punishment of his crime *civiliter* is no answer to the Articles of War.

In Howe's case the accused, a captain in the Army, killed a private soldier by cruelly beating him while on march in the Territory of Florida in 1839. In April, 1840, he was court-martialed upon the charge of cruel conduct, with the proper specifications, and pleaded in bar an indictment for manslaughter for the same offense in the Supreme (or Superior) Court of the Eastern District of the Territory of Florida. The court-martial proceedings were then suspended until the decision of the civil court should be known. In 1841 Howe was acquitted by the Territorial court, and then the court-martial proceeded and the accused pleaded this acquittal in bar as well as not guilty. The court-martial found him guilty on some of the charges, and sentenced him to be suspended from rank, pay, and emoluments for a year. Mr. Cushing held:

> It is clear that the offences charged against Captain Howe were offences against the laws of the United States for the government of the Army, and that the special pleas pleaded by the accused before the court-martial were not sufficient in law to oust the jurisdiction of that court. * * * I feel constrained to say that in my opinion there is no shadow of legal cause in fact or in law to declare the sentence of this court [the court-martial] void *ab initio*, and no rightful cause or authority to review or reverse the decision for alleged error. (6 Op., 512, 516.)

In the course of the latter opinion Mr. Cushing said:

> Assault and battery and homicide are violations of the municipal laws of the place where committed, to be tried and punished by the proper tribunal of the State or Territory whose peace was broken and laws offended. But the same acts being done by an officer or soldier of the Army of the United States, over and above the breach of the local law, is a breach also of the law of the United States, a violation of the rules and articles for the government of the Army of the United States. * * * In such case the offender is punishable both as a citizen subject to the municipal law of the place and also as a soldier or officer subject to the military law of the United States.
>
> Such double accountability to two different jurisdictions and to different and double punishments for the same act, making two different offenses, is settled to be lawful by the decisions of the Supreme Court of the United States. [Citing *Moore* v. *The People of the State of Illinois*, 14 How., 20; *Fox* v. *The State of Ohio*, 5 How., 434, 435; *United States* v. *Marigold*, 9 How., 569.]

See also *United States* v. *Amy*, opinion by Mr. Chief Justice Taney, reported in *Negro Ann Hammond* v. *The State* (14 Md., 135).

Another case may be cited here. Lieutenant Maney killed Captain Hedberg at Fort Sheridan, Ill., in 1893. Maney was turned over to the civil authorities and was tried in the United States Circuit Court for homicide and acquitted. Subsequently he was

brought to trial before a court-martial at Fort Snelling, Minn., for the same act. Previous to arraignment before the court-martial he applied to the United States Court for a writ of prohibition, which was denied (61 Fed. Rep., 140). It was held that a military court has jurisdiction to try a homicide under a charge of "conduct to the prejudice of good order and military discipline," and under that jurisdiction had authority to go to the merits and pass upon all matters of defense, including a plea of former jeopardy, without interference by any other court. The military trial then proceeded, and the special plea of former trial was set up. The plea was overruled and the accused pleaded not guilty. Being convicted under some of the specifications, he was sentenced to be reprimanded. Judge-Advocate-General Lieber, reviewing the case, comments as follows:

> This plea was properly overruled. It is a sound principle that an officer or soldier of the Army who has been subject to a civil trial for an act of crime remains amenable to trial by court-martial for such purely military offense against the discipline of the service as may have been involved in his act. * * * By the punishment awarded, the court has crowned a grave and important trial by a sentence so trivial and disproportionate to the offenses charged and established as to bring reproach upon the authority by which the trial was ordered, and to compromise the military service.

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These proceedings were submitted to the Acting Secretary of War on August 3, 1894, and the following is recorded as the action of the President in the case:

> By direction of the President, after a full and careful examination of the evidence and proceedings in this case, the findings of the court under the first charge, and the sentence, are hereby disapproved.
>
> JOSEPH B. DOE,
> *Assistant Secretary of War.*

In view of these strictures of the reviewing authorities, the comment seems just that a military trial for the gravest offense may result in a total failure of justice.

The case is not published, but the record of course is open to inspection on the files of the War Department. (Art. 113.)

Moore v. *Illinois* (14 How., 13), which Mr. Cushing finds conclusive in Steiner's case, involved an act of Illinois which punished the harboring or secreting of negro slaves, and an act of Congress which punished those who interfered with the master in recapture and reclamation. The defendant was indicted and convicted under the Illinois statute, the validity of which was called in question in this court as in conflict with the act of Congress. The court said:

> Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction

> of the laws of either. The same act may be an offense or transgression of the laws of both. * * * Yet it can not be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other. (Citing *Fox* v. *Ohio* and *United States* v. *Marigold*.)

As to the "*dictum* of Mr. Justice Woodbury in a previous case" (*Wilkes* v. *Dinsman*, 7 How., 89123), that action was civil, and the question was as to the admissibility of the proceedings of a court-martial. The court states that such proceedings were not conclusive on the plaintiff, "though a bar to subsequent indictments in courts of common law for the same offense." An examination of that case and of the authorities cited shows that the remark was altogether *obiter*, and it was so characterized, with expressions of deference, in *United States* v. *Cashiel* (Fed. Cas., 14744).

In *Ex parte Mason*, 105 U. S., 696, the court distinguishes between the civil and military offence inhering in the same act, and adds:

> Whether, after trial by the court-martial, he can be again tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction.

In *United States* v. *Clark* (31 Fed. Rep., 710) Judge Brown, afterwards Mr. Justice Brown of this court, thus begins his opinion:

> In view of the fact that this was a homicide committed by one soldier, in the performance of his alleged duty, upon another soldier, within a military reservation of the United States, I had at first some doubt whether a civil court could take cognizance of the case at all. But as crimes of this nature have repeatedly been made the subject of inquiry by civil tribunals, I have come to the conclusion that I ought not to decline to hear this complaint. Indeed, it is difficult to see how I could refuse to do so without abdicating that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity. [Citing Tytler upon Military Law; *United States* v. *Cornell*, 2 Mason; *United States* v. *Carr*, 1 Woods, 480; Attorney-General Cushing's opinion in *Steiner's case*.]

On the ground that there was no doubt that the deceased was killed by the prisoner under the performance of a supposed obligation to prevent his escape by any means in his power, and that there was an entire absence of malice, Clark was discharged. But as to the finality of the acquittal by the court of inquiry, Judge Brown said:

> In this connection it is urged by the defence that the finding of the court of inquiry acquitting the prisoner of all blame is a complete bar to this prosecution. I do not so regard it. If the civil courts have jurisdiction of murder,

notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings in one can not be pleaded as a bar to proceedings in the other; and if the finding of such court should conflict with the well recognized principles of the civil law, I should be compelled to disregard it.

In *Coleman* v. *Tennessee* (97 U. S., 509) the ground of decision ousting the jurisdiction of the State court was that the murder was committed and the conviction by court-martial adjudged in time of war in the enemy's country under section 30 of the act of Congress of March 3, 1863 (12 Stat., 736), now paragraph 58 of the Articles of War.

The opinion, however, says:

> But the section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by State courts. It simply declares that the offenses shall be "punishable," not that they shall be punished by the military courts; and this is merely saying that they may be thus punished.
>
> Previous to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exer-

> cised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.

It is then laid down that since under the doctrine of The Exchange (7 Cr., 139), an army marching through a friendly country by permission of its sovereign is exempt from its civil and criminal jurisdiction, *a fortiori* would an army invading an enemy's country be exempt; that the territory of Tennessee was enemy's country until long afterwards, and that while the defendant's plea of former conviction by court-martial was not a proper plea because it admitted the jurisdiction if it were not for the former conviction, the court would give effect to the objection thus irregularly raised by holding that the State court had no jurisdiction at all to try and punish the offense.

In *United States* v. *Cashiel* (Fed. Cas., 14744; 1 Hughes, 552), the civil jurisdiction was sustained after conviction by a court-martial. Although it was time of war, the authority of that case is not overruled by *Coleman* v. *Tennessee*, because it was not enemy's country (Maryland), and the civil jurisdiction was in the Federal and not the State court.

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act

may be an offense against two statutes." (*Morey* v. *Commonwealth*, 108 Mass., 433, cited in *Carter* v. *McClaughry*, 183 U. S., 365, 395.) The principle is the same when the same act is an infraction of a municipal ordinance and a penal offense against the sovereign. (*United States* v. *Cruikshank*, 92 U. S., 542; *Moore* v. *People*, 14 How., 17; *United States* v. *Barnhart*, 22 Fed. Rep., 285; *State* v. *Taylor*, 133 N. C., 755, 759, 760; *Abbott* v. *State*, 75 N. Y., 602; *Campbell* v. *People*, 109 Ill., 565.)

In 3 Op., 749, there was a plea in bar of having been tried in a Territorial Supreme Court on the charge of manslaughter (apparently *Howe's case*, 6 Op., 506).

> I am quite clear the plea in bar of *autrefois acquit* is not good, the offense which is the subject-matter of the second trial being altogether different from manslaughter, viz, unofficer-like or ungentleman-like conduct, to be punished according to the eighty-third article of war [now sixty-first].

All these authorities seem to point unerringly to the conclusion that when a man stands in the particular dual relation of criminal liability to a court-martial and to the civil courts he may be punished by each without involving double jeopardy, and that no distinction can be drawn between different offenses against different sovereigns and different offenses against the same sovereign.

Finally, the military authorities establish the foregoing doctrines as a matter of existing practice.

> A former conviction or acquittal of an act, by a civil court, is not a good plea in bar before a

> court-martial on charges and specifications covering the same act. (Benét, Military Laws and Courts Martial, 100.)
>
> Where an officer or soldier having been acquitted or convicted of a criminal offense by a civil court is brought to trial by a court-martial for a military offense involved in his criminal act, he can not plead "a former trial" in the sense of this article (art. 102). * * *
>
> Where an officer who had killed a superior officer in an altercation at a military post was brought to trial before a civil court on a charge of murder, and acquitted, and was subsequently arraigned before a court-martial for an offense against military discipline involved in his criminal act: *Held*, that a plea of former trial interposed by him was properly overruled by the court. (Digest Opinions of the Judge-Advocates-General of the Army, par. 306, 309, p. 92.)

The converse is certainly true, and the Judge-Advocate so holds:

> So where the trial for the military offense has preceded, he can not plead *autrefois acquit* or *convict* to an indictment for the civil crime committed in and by the same act. (Id., par. 306, *ut sup.*)

As to the other points involved, the State may proceed without an application on behalf of the injured person:

> The article [fifty-eighth] is directory, not jurisdictional. It does not limit the action to be taken by the military authorities to cases where the application is made by the

injured party or in his behalf. It does not place a soldier who has committed a crime and been indicted therefor beyond the reach of the civil power, if the person injured does not apply for his surrender. In a case—one of murder, for example—where there can be no personal application, the State properly takes the place of the individual. * * * and upon its demand it is the duty of the commanding officer to surrender the party charged. (Paragraph 102, p. 38, Dig. Op., J. A. G.)

The military *charge* is not conclusive and exclusive on jurisdiction:

> A crime which is in fact murder and capital by statute of the United States or of the State in which committed can not be brought within the jurisdiction of a court-martial under this article by charging it as "manslaughter, to the prejudice," etc., or simply as "conduct to the prejudice," etc. If the specification or the proof shows that the crime was murder and a capital offense, the court should refuse to take jurisdiction or to find or sentence. If it assume to do so, the proceedings should be disapproved as unauthorized and void. (Id., par. 148, p. 48.)

II.

The Court of First Instance had Jurisdiction.

However the case may stand as between national and local jurisdiction, civil or criminal, over a reservation of the United States in one of the original

States or in a State subsequently admitted, there is no doubt of the plenary power of Congress anywhere in a Territory. (*United States* v. *Cornell*, 2 Mason, 60; *People* v. *Godfrey*, 17 Johns., 225; *Commonwealth* v. *Young*, Brightly (Pa.), 302; 7 Op., 571; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525; Mr. Justice Miller in *United States* v. *Stahl*, 1 Woolw., 192—a case of murder in a military post—and in *United States* v. *Ward*, id., 1; *Painter* v. *Ives*, 4 Nebr., 122; *Marion* v. *State*, 16 id., 349; 20 id., 233; *McCracken* v. *Todd*, 1 Kans., 148; *Clay* v. *State*, 4 Kans., 49; *United States* v. *McBratney*, 104 U. S., 621; *Ex parte Crow Dog*, 109 U. S., 556; *United States* v. *Kagama*, 118 U. S., 375; *In re Wilson*, 140 U. S., 575; *Murphy* v. *Ramsay*, 114 U. S., 15; *Mormon Church* v. *United States*, 136 U. S., 1.

The question simply is, What has Congress done? In the case of Indians and Indian country Congress has specifically legislated on the subject.

> The jurisdiction of the United States over these reservations and the power of Congress to provide for the punishment of all offenses committed therein, by whomsoever committed, are not open questions. * * * And this power being a general one, Congress may provide for the punishment of one class of offenses in one court and another class in a different court. There is no necessity for and no constitutional provision compelling full and exclusive jurisdiction in one tribunal; and the policy of Congress for a long time has been to give only a limited jurisdiction to United States courts. (*In re Wilson, ut sup.*)

But Congress has not enacted any special laws regulating the jurisdiction over crimes committed on a military reservation in a Territory, whether committed by military persons or not. Congress has provided for the punishment of certain crimes when committed in any place or district of country "under the exclusive jurisdiction of the United States." (Sec. 5339, R. S., *et seq.*) On the other hand, Congress has organized Territorial governments and created courts possessing complete civil and criminal jurisdiction, without restriction as to locality, and has empowered Territorial legislatures to enact codes of law subject to revision by Congress. (R. S., Title XXIII, c. 1, 2, especially secs. 1851, 1868, 1895, 1910, 1925; 7 Op., 561.)

There are, it is true, two sides to those courts, because they are clothed with the jurisdiction of Circuit and District Courts of the United States in all cases arising under the Constitution and laws of the United States. (Sec. 1910, R. S.; *Ex parte Crow Dog*, 109 U. S., at p. 560; *Ex parte Gon-Shay-Ee*, 130 U. S., 343, 348.) But that provision only emphasizes the fact that the contest here is not between the two *judicial* jurisdictions of the same sovereign, but between the judicial jurisdiction and the executive and military jurisdiction.

As to a Territory at large, the Supreme Court of Colorado said in *Franklin* v. *United States*, 1 Colo., 35:

> It appears to us that Congress has always acted in the belief that a Territory of the United States is not a place or district of

> country under the sole and exclusive jurisdiction of the United States within the meaning of the law under consideration. An examination of the laws of the United States respecting the Territories discloses the theory upon which Congress has always acted, which is that in the exercise of its undoubted right to govern the Territories, that body, deeming it inconvenient or inexpedient to provide municipal laws for the Territories, directly and by its own act erected Territorial governments and delegated to them authority to enact such laws. [Citing *Leitensdorfer* v. *Webb,* 20 How., 176.]

As between the two judicial jurisdictions there are only two cases closely in point, and it does not appear in them that the murder was committed by an officer or soldier, although it was committed on a military reservation. In *Scott* v. *United States,* 1 Wyo., 40, the Federal jurisdiction was sustained without opinion. In *Burgess* v. *Montana,* 1 L. R. A., 808, *Scott* v. *United States* was disapproved, and the Territorial jurisdiction sustained on the ground that the governments and courts of the Territories were created by Congress, that Congress had not restricted the jurisdiction of the local courts, or reserved exclusive jurisdiction in the Federal courts, and that section 5339 did not apply. The language of that opinion is:

> The reservation of a given portion of the public domain for military purposes by the United States in no way interferes or conflicts

with the extension and operation of the local law and the jurisdiction of local courts over the military reservation. In this respect there may be, and doubtless is, a divided jurisdiction, the United States occupying the reservation for military purposes only, while the local government occupies it for the purpose of civil government and the administration of its laws. * * * The jurisdiction of the United States over a military reservation is not exclusive, and does not deprive the Territorial laws and courts of the jurisdiction conferred on them by law.

In 7 Op., 561, 564, Mr. Cushing said:

> I doubt whether a homicide committed within what is a mere military or other reservation in an organized Territory comes within the general provision of the act of Congress as to the punishment of crimes by Federal law. Such reservation is not a place "ceded" to the United States in the apparent sense of the act [act of March 3, 1825, 4 Stat., 115]—that is, ceded by a State. It is under the jurisdiction of the United States, to be sure, in the same sense that the rest of the Territory is, and is excluded from preemption and entry, but is not under the jurisdiction of mere Federal courts in the sense of that act.

As the point has not been conclusively adjudged, there might be a question in this court, if the case arose in an organized Territory, whether the Federal or local court had cognizance. But if *any* civil court under the authority of the United States has cognizance, the military jurisdiction as exclusive is ousted

and the opposing claim might as well be advanced in a case like Cornell's, where the murder was of a soldier by a soldier at Fort Adams, in Newport Harbor. I suppose that in the organized Territories, as in the States, the military authorities do not assert this exclusive jurisdiction, but commonly turn offenders over to the civil authorities in case of murder or any other grave crime, whether the crime was committed by a military person or a civilian. Yet the courts of the organized Territories, both on the Federal and Territorial sides, are mere legislative courts and, however different as to jurisdiction and in other respects, are not courts of the United States in the sense of the Constitution any more than the Philippine courts, which also rest upon the plenary power of Congress.

The propositions, then, are:

Congress has created the Territorial courts and authorized and approved their general civil and criminal jurisdiction.

Congress has not distinguished between crimes committed by or against military persons, or between crimes so committed on or off a military reservation.

Congress, in defining and punishing crimes subject to exclusive Federal jurisdiction, had in mind the case of a Federal reservation in a State, and not the case of a Territory in general or of a reservation within a Territory.

As Congress has exclusive jurisdiction everywhere in a Territory, to be exercised as it sees fit, and has made no exception regarding a military reservation, where the jurisdiction of the United States is neither

more nor less exclusive than elsewhere in the Territory, it would seem that Congress intends the jurisdiction over ordinary crimes to be exercised universally by the local courts. It is worthy of note on this point, as showing the same preference, that Congress has expressly sent into the local courts certain grave crimes committed by Indians in a Territory, whether on or off a reservation. It required the express provision in that case, because of the Indian relations and the previous laws. (Sec. 9, act of Mar. 3, 1885; 23 Stat., 362, 385; Kagama case, 140 U. S., at pp. 376, 377, 383.)

Congress has not conferred upon the military tribunals in time of peace in the Territories or elsewhere any such jurisdiction as claimed. On the contrary, the rule of surrender to the civil authorities is controlling wherever in the United States or its Territorial possessions the army may be, and the inference is that Congress means the general principle to prevail,which except in time of war and in enemy's country, prefers the civil to the military tribunals.

It is not as if there were no competent civil judicature in the Philippines established by the legislature, or as if the legislature had conferred exclusive jurisdiction upon the military tribunals. The power of the Crown in England in the absence of legislation is complete, and while the power of the Executive here does not extend so far, there might be some reason for the argument advanced, if the Executive had sought to confer exclusive jurisdiction upon the military tribunals, or if Congress and the Philippine leg-

islative authority had not acted. Compare the case of Gibraltar, a mere isolated military post in a foreign land. (*King* v. *Suddis*, 1 East, 306, in which it was admitted on behalf of the prisoner that "the King had a military power to try offenders of this description at Gibraltar in the absence of all civil judicature at that place.") Compare also the power of courts-martial (in 1840) under an act of Parliament at places beyond a certain distance from the presidencies of Fort William, Fort St. George, and Bombay. (3 and 4 Vict., c. 37, sec. 2.)

But the present case is not one where there are no civil courts or, as yet, only native tribunals. The Courts of First Instance in the Philippines are not native courts. They are courts of competent jurisdiction established and existing under the authority of the United States.

During the war and insurrection in the Philippines there was at first a suspension of the civil courts. They were gradually restored with their former jurisdiction, first on the civil and then on the criminal side. This restoration took place under the military government; and section 109 of General Orders 58 (1 Public Laws Phil. Com., Appendix, pp. 1082, 1095) provides that from the date of that order the ordinary civil and military tribunals each within its proper limits shall have exclusive jurisdiction over all crimes with which any person within the islands may be charged. Until the military government terminated the jurisdiction over crimes committed by military

persons anywhere was naturally reserved in the military tribunals.

The judiciary act of June 11, 1901 (1 Phil. Laws, 252, 262), gave the courts of first instance jurisdiction in all criminal cases in which the penalty is more than six months' imprisonment or a fine exceeding $100 (sec. 56). The civil jurisdiction of the provost courts was withdrawn by that act (sec. 78), and their criminal jurisdiction, except over purely military offenses, was withdrawn, at first in Manila (act of August 5, 1901, sec. 3; id., 375), and on May 16, 1902, throughout the islands except in districts exclusively under military control (act No. 400, sec. 2, id., 963).

The civil government has passed laws in aid of the military authority (act of September 3, 1903, act of April 28, 1904, 3 Phil. Laws, pp. 9, 327), respecting the execution of military sentences, and the appearance of civil witnesses before courts-martial. The act of November 24, 1902 (2 Phil. Laws, 157) defines the jurisdiction of the civil and military authorities, respectively, over military reservations. It contains various provisions in aid of the military control of the reservation for military uses, but asserts plainly the civil jurisdiction so far as it does not interfere with military administration or use.

Sections 3, 7, and 8 of that act are as follows:

> SEC. 3. No branch of the civil government in force on or over any public lands reserved by the President for military purposes, and no civilian residents thereon, shall interfere

with military administration or the use of such lands for military purposes.

SEC. 7. No arrest of any officer, soldier, or civilian employee in the military service of the United States on any military reservation, camp, or barracks, shall be made except on warrant in due form in writing and served upon the commanding officer thereof.

SEC. 8. All laws or parts of laws in force in the Philippine Islands not inconsistent with military use of any public lands reserved by the President for military purposes shall be in full force and effect over said lands.

Thus it appears that the military jurisdiction, which was universal at the outset, has been gradually restricted and withdrawn, first by the military authorities themselves before their government terminated, and then by enactments of the Commission. Coupled with that cessation of the military régime is a specific provision of the legislature giving to the civil government jurisdiction over military reservations for all purposes consistent with military use; so that there is no substantial distinction between the case of a military reservation in the Philippines and in an organized Territory of the United States.

The Philippine government act of July 1, 1902 (32 Stat., 691), provided (sec. 9):

> That the Supreme Court and the Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to

> the power of said government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law.

(See Kepner *v.* United States, 195 U. S., at pp. 114–119.)

Section 86 of that act directs that all laws passed by the Philippine government shall be reported to Congress, and reserves the power to annul the same. The attitude of Congress to the organized Territories is similar (sec. 1850, Rev. Stat.); and thus it would seem that the exercise of local jurisdiction over a reservation in the Philippines is valid until and unless disapproved by Congress.

The attorney-general of the Philippines has held that the reservation of lands in the Philippine Islands for military purposes by the President of the United States merely subjects said lands to the proprietary control of the National Government. It does not have the effect of withdrawing them from the operation of the laws passed by the Commission, nor from the jurisdiction of the regularly constituted authorities. (1 Op. Atty. Gen. P. I., p. 326; id., 332; Official Gazette, vol. 4, No. 5, p. 61.)

The order of reservation herein was issued under section 12 of the act of July 1, 1902, which provides as follows:

> That all the property and rights which may have been acquired in the Philippine Islands

> by the United States under the treaty of peace with Spain, signed December 10, 1898, except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands, to be administered for the benefit of the inhabitants thereof, except as provided in this act.

The order of reservation was dated September 1, 1903 (War Dept., G. O. No. 34, October 13, 1903) and "reserved for military purposes subject to private rights, pursuant to section 12 of the act of Congress approved July 1, 1902. * * * 7. For the military post and reservation at Camp Jossman, near Buena Vista, Guimaras Island: (*a*) All public lands included within boundaries described as follows [giving the metes and bounds]; (*b*) All public lands included within boundaries described as follows [giving the metes and bounds]."

It is to be assumed, I suppose, in the absence of any clear indication in the record, that this is the order of reservation, and the tracts reserved include the property and buildings at the Buena Vista landing where this crime was committed.

It is clear that no reservation of exclusive jurisdiction can be claimed under this order.

In an opinion dated December 10, 1906 (26 Op., —) the Attorney-General held as to the naval reservation at Subig Bay in the Philippines, where the language of the order was that the lands were reserved for

naval purposes, and said reservation and "all lands included within said boundaries are placed under the *governance and control* of the Navy Department," that the military jurisdiction did not exclude any civil and judicial powers of the Philippine government which did not interfere with the naval uses of the reservation.

In the Draper case (164 U. S., 240) the enabling act of Montana provided that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;" but the court rejected the inference sought to be drawn from that language of exclusive jurisdiction in the courts of the United States.

In an organized Territory for offenses against the laws of the United States process runs in the name of the United States (*In re Wilson*, 140 U. S., 575, 576, 579), and it seems that the rule should be the same for offenses against the laws of the Territory, although the practice is otherwise. "It must be confessed that this practice exhibits somewhat of an anomaly. Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the Government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States." (*Snow* v. *United States*, 18 Wall., 317, 321.) The practice in the Philippines has conformed to the rule thus laid down, but the

distinction would seem to be largely matter of form and not especially significant or controlling upon any of the fundamental principles now involved.

In the Colley case (3 Official Gazette, 62) the crime was committed and the accused convicted during the insurrection, and therefore the case was within article 58, and the military jurisdiction exclusive and final. In 24 Op. A. G., 570 (Captain Brownell's case), it was held that for a criminal offense committed during the insurrection the military jurisdiction was exclusive, and that the offense not having been then and thus tried, a court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer, now that peace has been proclaimed in the Philippines.

Concluding, under this branch of the case also it is found that the existing military law of the United States holds that territorial courts take jurisdiction of a crime committed on a reservation.

> The provisions of the article [fifty-ninth] are applicable only when the officer or soldier is accused of a crime or offense "which is punishable by the laws of the land;" that is, by the laws of the particular State or Territory or of the United States or by the common law as recognized in the State or Territory. (Dig. Op. J. A. G., par. 96, p. 36.)
>
> The term "any of the United States" employed in this article, *held* properly to include any and all the political members of our governmental system, and to embrace an organized Territory equally with a State. (Id., par. 101, p. 38.)

The officers and soldiers of the Army within a Territory are subject to its criminal laws equally with its citizens, except where the enforcement of such laws would obstruct the operations of the United States. (Id., par. 2437, p. 687.)

A territorial statute is operative upon a military reservation within the Territory so long as it does not conflict with the laws of the United States or with the military administration or legitimate operations of the Government. (Id., par. 2439, p. 687.)

III.

Grafton was not Entitled to be Indicted by a Grand Jury or Tried by a Petit Jury.

It is well settled that a State is not bound by the limitations of the Constitution of the United States expressly relating to or affecting this subject. Due process of law does not necessarily require an indictment by grand jury in a prosecution by a State. (*Hurtado* v. *California*, 110 U. S., 516.)

"The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either." (*Maxwell* v. *Dow*, 176 U. S., 581, 604, and auth. cit.)

In *Hawaii* v. *Mankichi* (190 U. S., 197), it was held that until the Constitution was formally extended to the Hawaiian Islands, the criminal pro-

cedure theretofore in force in those islands continued under the resolution of Congress which did not substitute the common law proceedings by grand and petit jury.

And finally, in *Dorr* v. *United States* (195 U. S., 138, 149), approving the opinion of the court in the Mankichi case and the concurring opinion of Mr. Justice White, it was held that—

> The power to govern territory, implied in the right to acquire it and given to Congress in the Constitution in Article IV, section 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not without legislation and of its own force carry such right to territory so situated.

But the claim is made that because the defendant was in the Philippines in pursuance of his duty by virtue of military orders, the decision in the Dorr case does not apply. On this point the Supreme Court of the Philippines in another case well says (Record in *Carrington* v. *United States*, No. 597 of the present term, p. 15):

> Let us suppose, therefore, that the accused was sent by order of the President of the United States to a certain State in which there was no provision as to trial by jury, and that while there he broke the laws of that State: Could

> he insist in the courts of that State, where there was no provision made for jury trials, that he be tried by jury according to the Constitution of the United States, which does not rule nor has any application in said State? In our opinion when a citizen, whether a member of the United States Army or no, goes to a certain State or Territory of the Union and breaks the laws thereof, he is subject to be judged in accordance with the rules established in said State or Territory, so long as the system of procedure in force in said Territory or State be of a just and impartial character.

Anyone who violates law is to be tried by the law violated, which is *a fortiori* when an officer and citizen of the United States violates a law of one of the possessions of the United States.

In re Ross (140 U. S., 453) held that an American seaman could be punished for murder by the consular court in Japan without a jury trial. The seaman, although an alien, was clothed *pro hac vice* with all the qualities of a citizen under the law. He was entitled to the protection and benefits of the acts of Congress on behalf of American seamen, and was subject to all their obligations and liabilities. He was thus held to be within a law which subjected to trial by the consular court "all citizens of the United States charged with offenses against law committed in" Japan (secs. 4083, 4084, R. S.). He took the burden with the benefits, of course, but he had the status of a citizen. Now the language of the Secretary of State, approved in that opinion, makes it

clear that a seaman in the mercantile service is in an organized national service governed by a special and complex system of law. His case is assimilated to that of a soldier during his enlistment.

It is to be remarked, then, that each can enlist in his service or not as he chooses, but having enlisted, one as much as the other is bound to go where the orders of his superiors send him under his contract and the law. Both are subject to the law of the place as provided or approved by the national authority.

It is also to be remarked (on another point in the case) that the Ross decision shows, as above indicated, that no objection can be predicated on the literal restriction of the fifty-ninth article of war to "any offense against the person or property of any *citizen* of any of the United States." "Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the Government;" citing among other authorities 1 Hale's Pleas of the Crown, page 542, where it is said of a statute punishing robbery of the "King's subjects," "though it speaks of the King's subjects, it extends to aliens robbed; for though they are not the King's natural born subjects, they are the King's subjects when in England by local allegiance." (140 U. S., at pp. 475–476.)

It would seem that the native inhabitants of the Philippines are entitled to the care and protection of

the Government at least as much as alien seamen in our mercantile service, and therefore that they are within an equitable extension of the language of article 59.

The just conclusion is that while citizens and others within the United States are entitled to trial by jury in criminal cases arising under the Constitution and laws of the United States, neither citizens nor others, whether in the military service or not, are so entitled before a tribunal created by or under the authority of the United States, either in a foreign country or in a territorial possession of the United States. (140 U. S., at p. 464, citing *Cook* v. *United States*, 138 U. S., 157, 181.)

Finally, if soldiers in the Philippines are to be tried in accordance with the constitutional provisions, but other citizens and the native inhabitants have no such rights, there would seem to be a violation of the guarantee of equal protection of the laws. (Sec. 5, Philippine government act.)

IV.

Grafton was not in the Performance of his Military Duty and is not Justifiable.

The facts are expressly found by the trial court, and the Supreme Court does not materially revise the findings. It is found there was no "rush" and no intention to rush, although the two Filipinos, ignorant of the fatal risk, were probably playing on the unfounded suspicions and evident appre-

hensiveness of the sentry. The killing of Castro is necessarily part of the *res gestæ* here, and the finding is that he was shot through the side, not in front. An aggressor at the supreme moment of attack does not come on sideways. Villanueva was unarmed, and the sentry knew it. He instantly desisted from his so-called advance and fled. Grafton, though observing this, slipped another cartridge into his rifle and shot his victim as he was crouching against the wall of the storehouse, which stopped further flight.

This was not the case of an escaping felon. In such a case, however, where it was doubtful whether the deceased was in reality attempting to escape arrest or had surrendered, the court noted the concession that if he had it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by Federal law. (*Drury* v. *Lewis*, 200 U. S., 1, 8.)

Blackstone states the fundamental distinction:

> And as the manner of the defense, so is also the time to be considered; for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defense. (4 Bl. Com., 185.)

Unless the accused has reasonable ground of apprehension at the time, the justification of self-defense will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the

party entertaining such fears in killing the other party by way of precaution if there be no actual danger at the time. (1 East P. C., 272; *State* v. *Scott*, 4 Ired., 409; *State* v. *Harris*, 4 Jones, 190; *Dill* v. *State*, 25 Ala., 15; *Dyson* v. *State*, 26 Miss., 362; *Holmes* v. *State*, 23 Ala., 24; *Carroll* v. *State*, 23 id., 33.)

While the rule has been laid down that a person free from fault "may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense" (1 East P. C., 271), the courts have held that the rule applies only where real danger still exists and where the aggressor is retreating in order to gain advantage so as to renew the conflict; and that even in the most extreme cases the right to pursue and kill a retreating assailant ceases as soon as the necessity for defense has ceased and the danger is no longer immediate and impending. (*Morgan* v. *State*, 67 S. W., 420, 424; *Johnson* v. *State*, 50 S. W., 343, 345; *People* v. *Hecker*, 109 Cal., 451, 463; *Luckinbill* v. *State*, 52 Ark., 45, 47; *Oregon* v. *Conally*, 3 Oreg., 69, 72.) In the case last cited the court charged the jury that—

> The law of self-defense does not justify one in following up his adversary after the immediate danger has ceased and then killing him. Such a law would make every man his own avenger.

In *Beard* v. *United States* the attack was continuing; there was no retreat (158 U. S., 550).

In *Allen* v. *United States* (150 U. S., 551), the accused was struck and thrown down and committed the homicide in the heat of the struggle.

In *Rowe* v. *United States* (164 U. S., 546, 557), the accused, after attacking slightly and then being attacked fiercely in turn, killed his assailant. The court say:

> If the accused did in fact withdraw from the combat and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard* v. *United States*.

"Deliberation" is a relative term. "While it may be psychologically true that in every sane act, with whatever swiftness performed, there is involved the prior determination to do it, often unappreciably separated in time, yet when the defense in a case of homicide is justification or excuse or action *in hot blood*, the question is one of fact and must be passed on by the jury in view of all the circumstances developed in evidence uninfluenced by metaphysical considerations proceeding from the court." (*Allen* v. *United States*, 150 U. S., 551, 561.)

The act was deliberate here, because Grafton knew or ought to have known under the circumstances that he need not shoot again. If he had time to load, he had sufficient time to pause and

reflect. The dissenting opinion concedes that this is clear now. Practically, as well as legally, it was just as clear at the moment to a trained soldier held to a high degree of self-control and responsibility as well as alertness. Indeed, he was bound to a higher degree of care than an ordinary reasonable and prudent man, and this killing, by any one, was unnecessary if not wanton.

I submit that the judgment below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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No. 358.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

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IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to advance the above-entitled cause on the docket and set it down for hearing on a day convenient to the court during the present term.

On July 24, 1904, Homer E. Grafton, a soldier in the Army of the United States, while on guard as sentinel at Buena Vista, on the island of Guimaras, near Iloilo, Philippine Islands, shot and killed two natives, Florentino Castro and Felix Villanueva, who were passing along a highway crossing the military reservation. After trial and acquittal by a court-martial, Grafton was arrested and tried for the killing of Villanueva

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only, in the Court of First Instance for the Ninth Judicial District, charged with the crime of assassination. He was found guilty of homicide and sentenced to imprisonment for twelve years and one day. He appealed to the Supreme Court of the Philippine Islands, by which court the judgment was affirmed, and thereupon sued out this writ of error.

The questions raised in the case are whether the defendant, because of his prior trial by a court-martial, has been twice put in jeopardy for the same offense; whether he was entitled to a jury trial; whether the civil courts of the Philippine Islands had jurisdiction to try a soldier for an act claimed to have been done in the performance of military duty; and whether the act, claimed to have been committed without malice and in the honest and reasonable belief that the defendant was discharging his duty as sentinel, constituted homicide in violation of article 404 of the Penal Code of the Philippine Islands.

Opposing counsel concur in this motion.

It is suggested that the second Monday of March would be satisfactory to counsel for the hearing of the case.

HENRY M. HOYT,
Solicitor-General.

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